IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20030 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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PUSHPABEN CHAMPAKLAL SHAH (LOKHANDWALA) & 1 - Petitioner(s)

Versus

RIKHAVDEV TIRTHRAM SHARMA & 19 - Respondent(s)

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Appearance :

MR KASHYAP R JOSHI for Petitioner(s) : 1 - 2.
MR PK HANDA for Respondent(s) : 1 to 20

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 11/10/2005

ORAL JUDGMENT

1. Heard Mr.K.R. Joshi, learned counsel appearing for the petitioners and Ms.Renuka Gaur, learned counsel appearing on behalf of Mr.P.K. Handa for the respondents.

2. Rule. The formal service of Rule is waived by Ms.Renuka Gaur on behalf of the respondents. The Rule is fixed forthwith on consent.

3. The present petition is moved under Article 227 of the Constitution of India by the petitioners-orig.plaintiffs making grievance against the order passed by the ld.Civil Judge (J.D.), Ankleshwar, whereby the petitioners-orig.plaintiffs are directed to step into the witness-box as witnesses of the defendants and that too before the respondents-orig.defendants' examination to disprove the case of the petitioners and to prove the contentions raised by the respondents-defendants in the written statement.

4. The complication cropped up in the proceedings of Regular Civil Suit No.10 of 1992 when the plaintiffs decided to lead evidence through their power of attorney holder. Undisputedly, there is a detailed cross-examination of Shri

Ajay Ramlal, power of attorney holder of the plaintiffs and the contention of the defendants is that only with a view to prove certain documents, the orig.plaintiffs are required to be examined and when they lost hope after cross-examination of the power of attorney of the plaintiffs, and other witnesses they opted to summon the plaintiffs as their witnesses so that the original documents i.e. Mark 237/10 to 237/13 can be shown to the plaintiffs and in turn the same can be tendered in evidence. As per law, a document unless proved and formally tendered in evidence cannot be accepted in a proceeding and therefore, the mode selected by the defendants cannot be said to be illegal or unwarranted. Here in the present case, the plaintiff no.1 had not appointed any power of attorney holder till the date of filing of suit. So if any one of the plaintiffs is called and she refused to identify her or co-plaintiffs own signature on a document shown then in turn the defendants can examine any competent witness who

can throw light as to the genuineness of the signature of such witness. But before such witness or witnesses are called, the first person whose signature is in dispute, if is asked to step into the witness-box, then such attempt should be viewed as an act bona fide. Here these documents were shown to power of attorney holder but he has denied the suggestion made by advocate appearing for the defendants and therefore, these documents are not exhibited and received in evidence.

5.1 It is true that such a situation may tempt to otherside to put the contesting party into an awkward or embarrassing position. So on facts, no malice is otherwise smelt, the Court can exercise jurisdiction granting permission which has been granted in the present case by the ld.Civil Judge. In the present case, the ld.Civil Judge has permitted the defendants to examine the plaintiffs as their witnesses granting application Exh.333 and that to prior

to the deposition of the defendants themselves.

5.2 The sequence of the examination of the witnesses as accepted practice in the Civil Courts of our country and the scheme of Order 18 of Code of Civil Procedure r/w. Section 135 of the Indian Evidence Act. There is no express prohibition in examining otherside as witness that the party himself has to step into the witness-box and thereafter, examines the witness, if need be. The scheme of Rule 3(A) of Order 18 of the Code of Civil Procedure where a party himself wishes to appear as a witness, he shall appear before any other witness but this Rule has an important qualification which empowers Court to permit him to appear at a later stage on reasons. According to the respondents, the plaintiffs are very important witnesses and so they may be called and examined prior to them. So they can select the mode, prove the documents denied by the power of attorney holder. In a given case, the Court

can grant permission to examine any number of witnesses even prior to examination of either plaintiff or defendant and that course has been impliedly adopted by the learned Civil Judge. Some crucial documents have been admitted by the power of attorney holder but he has conveniently denied the genuineness of the signature of petitioner-Pushpaben orig. plaintiff no.1. At one point of time, Ms.Renuka Gaur, learned counsel appearing for the respondents has submitted that the day on which the Suit came to be filed, there was no power of attorney as such and thereafter, the power of attorney has been created and the said power of attorney holder has deposed on behalf of the plaintiffs.

6. I have also considered the contents of the power of attorney and there are not contents as to why the plaintiff was compelled to give power of attorney to Mr.Ajay Ramlal Shah (Lokhandwala). So in a given case, when the Court feels that to

avoid personal appearance in the Court. The use of power of attorney has been made by examining him on behalf of the contesting parties, then the Court even can call such party as its witness and ask certain questions because the ultimate mission is nothing but a fact finding mission and the truth is to be found out. So both the parties can examine such contesting party or witness but this being a private litigation, a civil dispute between two parties, the Court decided to grant permission to the defendants to examine both the plaintiffs as their witnesses. Here it would be beneficial to refer to the decision of the Kerala High Court reported in ***2000(4) C.L.J. 85, in the case of Jortin Antony v. SPD Marthanda Varma***. The Division Bench of the Kerala High Court after discussing various decision has held that :

> *"14. A few decisions on the question involved may be considered at this stage. In Pirgonda v. Viswanath (AIR 1956 Bombay 251) the practice of*

citing the opposite side as a witness was disapproved but the Court observed that if a party who is in a position to give evidence does not go into the box, the Court is free to draw an inference against him. This disapproval was also shared by the Mysore High Court in Mallan Gowda v. Gavisiddan Gowda (AIR 1959 Mysore 194). In Appavoo Asary v. Somammal Fernandez (AIR 1933 Madras 821) and in Suryanarayanaraju v. Appanna (AIR 1959 AP 645) it was held that for summoning the opposite party as a witness, resort to Order III, Rule I of the Code of Civil Procedure was not proper. But it was suggested that where one party desires the presence of the opposite party in Court for the purpose of examining him as a witness the proper procedure to adopt was the one under Order XVI, of the Code. In Syed Yasin v. Syed Mohd. Hussain (AIR 1967 Mysore 37) a learned Single Judge of the Mysore High Court held that it was permissible

for the Court in exercise of its power under Order XVI, of the Code to permit one party to cite his opponent as a witness. According to His Lordship, if the intention of the legislature was to impose any limitations on the power of a party in summoning and examining the other party as a witness, it would have specifically stated so in Order XVI, Rs.1, 19 and 20 as it had done in Rule 14 and if the Court comes to the conclusion that the prayer of a party to summon and examine the other party to the suit as his witness doe not amount to an abuse of process of Court, the prayer in that behalf can be allowed. In Awadh Kishore Singh v. Brij Bihari Singh (AIR 1993 Patna 122) it was held that a party cannot be debarred from examining his adversary and an order refusing permission to the plaintiff to examine the defendant as a witness was a jurisdictional error liable to be corrected in exercise of jurisdiction

under Section 115 of the Code of Civil Procedure. IN the recent decision of the Andhra Pradesh High Court in Kosuru Kalinga v. Kaikamma (2000 AIHC 786) it was held that the application seeking summoning of a party to the suit as a witness of the order party could not be dismissed on the sole ground of such a cause being not known to law since that would mean the overlooking of Rule 14 of Order XVI, of the Code. It was also indicated that if the applicant in that behalf fails to state reasons for such summoning, such a prayer cannot be allowed. All these decisions in our view only indicate that it is not as if the Court has no power to direct the examination of a party to the suit if it considers it necessary necessary to order his examination. Though these decisions observe that there is nothing in the Code which prevents one party from citing the opposite party as his witness, it is also clear that, there is

no clear enabling provision which entitles one party to insist on his opponent being called as a witness. Considering the general principle recognised by the Privy Council we are inclined to the view that in the absence of any provision conferring such a right on a party to the suit, it must be held that there is no right as such in a party to the suit to summon his opponent to give evidence. These decisions in our view fortify generally the view expressed by Shamsuddin, J. in the decision in Mary Francis v. Kesavan (1993(1) K.L.T. 4).”

7. It is true that such application should not be granted as a matter of course but at appropriate stage of hearing, the Court can pass such an order keeping the facts of each case and the conduct of the contesting parties in the matter. The order of production and examination of witness is an advocate's privilege which is subject to procedural laws as well as Court's

discretion. Here the question posed is whether defendant can be said to have been granted permission wrongly. My finding is in negative even on keeping the provision of Section 135 of the Indian Evidence Act in the background. It is true that even the party called as witness and asked to appear as witness for the otherside, refuses to appear or makes default in appearing before the Court in response to the summons issued, then the Court should take recourse of any coercive measure to take party into the Court but as observed in the said decision, adverse inference against the said party can be drawn, compelling him to appear forcibly under Court warrant instead.

8. In view of above observations, I do not find any merits in this petition and the same is hereby dismissed. Rule is discharged.

(C.K. Buch, J)

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